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No. 90-1320

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT CRAIG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to writs of error coram nobis vacating their mail fraud convictions because the jury instructions were erroneous under *McNally* v. *United States*, 483 U.S. 350 (1987), even though the indictment stated an offense, the evidence at trial was sufficient to support the convictions, and petitioners do not suffer from continuing civil disabilities.

2. Whether the court of appeals correctly held that the Estate of Jack E. Walker, a petitioner, lacks standing to apply for a writ of error coram nobis on behalf of the decedent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 907 F.2d 653. The opinion of the district court (Pet. App. 22-42) is reported at 703 F. Supp. 730.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1990. The judgment was amended and a petition for rehearing was denied on November 13, 1990. Pet. App. 16a-21a. The petition for a writ of certiorari was filed on February 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1976, petitioners Craig, North, and Pappas, and codefendant Jack E. Walker were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. Pet. App. 2. In addition, Craig and Pappas each were convicted on 11 counts of mail fraud; Walker was convicted on three counts of mail fraud; and North was convicted on two counts of mail fraud. Craig and Pappas were also convicted on two counts of violating the Travel Act, 18 U.S.C. 1952. Pappas was sentenced to ten years' imprisonment and fined $10,000; Craig, North, and Walker were each sentenced to five years' imprisonment and fined $5,000. The court of appeals affirmed the convictions. *United States* v. *Craig*, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978). Pet. App. 3.

In 1987, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not apply to certain schemes involving the deprivation of intangible rights, petitioners applied for writs of error coram nobis to vacate the convictions. The district court granted the applications of North and Walker's estate, but it denied the applications of Craig and Pappas. Pet. App. 22-50. The court of appeals affirmed the denial of coram nobis relief to Craig and Pappas, reversed the granting of relief to North, and dismissed the application of Walker's estate for want of jurisdiction. Pet. App. 1-18.

1. The evidence at trial, which is detailed in the court of appeals' opinion on direct appeal, showed that Craig, North, Pappas, and Walker participated in a scheme to bribe state legislators to pass a bill that would permit cement trucks to carry heavier weights on Illinois highways. In 1971, representa-

tives of the ready-mix cement industry wanted to increase by 4,000 pounds the weight of cement that trucks could lawfully carry on the State's highways. The industry trade association hired Pappas, who was a representative to the Illinois Motor Vehicle Commission, as their attorney. Pappas told the trade association that the passage of the legislation would cost $5,000 for his fee plus an unspecified amount of money in the future. The unspecified amount turned out to be $50,000 to be paid as bribes to members of the Illinois legislature. Although the bill was passed by both houses of the General Assembly, the governor vetoed it. When the trade association subsequently balked at paying anything to the state legislators, the legislators agreed to accept only $30,000. Eventually, $15,000 was distributed to various state legislators. Craig, North, and Walker were among the members of the General Assembly who received payments for their assistance in passing the bill. Pet. App. 2-3; *United States* v. *Craig*, 573 F.2d at 463-473.

The indictment and jury instructions on the conspiracy and mail fraud counts were predicated on the theory that Pappas, Craig, North, and Walker had devised a scheme to defraud the citizens of Illinois of their right to the loyal, faithful, and honest service of the members of the Illinois General Assembly. After their convictions were affirmed in 1977, Pappas, Craig, North, and Walker served their terms of imprisonment. Walker died in 1980. Pet. App. 3.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property inter-

est protected by the statute.[1] Thereafter, petitioners filed a joint coram nobis petition asking that the convictions be set aside and that the government return the fines that had been paid. Pet. App. 3.

After concluding that the conspiracy and mail fraud convictions were invalid in light of *McNally*, the district court granted coram nobis relief to North and to Walker's estate. It found that North was entitled to relief because he was subject to a variety of continuing disabilities imposed on convicted felons under state law, and that Walker's estate was entitled to relief because Walker's felony conviction precluded his widow from collecting state pension benefits. Pet. App. 22-26, 28-42. But the district court denied the applications of Pappas and Craig. The court noted that both Craig and Pappas had been convicted on two counts of violating the Travel Act in addition to conspiracy and mail fraud. It explained that "[t]he Supreme Court's rejection of the intangible rights theory of mail fraud in *McNally* did nothing to change the Illinois crime of bribery," which served as the unlawful activity underlying the Travel Act counts, "and thus Pappas and Craig's

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[1] Congress has since amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right to honest services." 18 U.S.C. 1346, added by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of that provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all pre-*McNally* case-law pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden); see also *id.* at 33,297 (1988) ("it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property") (statement of Rep. Conyers).

Travel Act convictions are as valid today as they were prior to *McNally*." Pet. App. 28. Because any lingering civil disabilities would continue on account of their Travel Act convictions, the court concluded that Pappas and Craig were not entitled to coram nobis relief. *Id.* at 26-28, 42-50.

3. The court of appeals ruled that none of the petitioners was entitled to coram nobis relief. Pet. App. 1-18. Relying on its decision in *United States* v. *Kerner*, 895 F.2d 1159 (7th Cir. 1990), the court first held that Walker's estate lacked standing to bring a coram nobis petition on behalf of the decedent. It therefore dismissed the application of Walker's estate for coram nobis relief for want of jurisdiction. Pet. App. 7-8, 16-21.

Relying on its decision in *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989), the court of appeals ruled that the other three petitioners had failed to establish any lingering civil disabilities resulting from their convictions that would justify coram nobis relief. Pet. App. 8-14. It found Pappas's claim that he was unable to regain his license to practice law as a result of his convictions to be "speculative" because Pappas had "not shown either that his conviction is a direct cause of his disbarment or that he has * * * any pending applications for his reinstatement." *Id.* at 12. The court also noted that the state disciplinary rules for lawyers "do not discipline lawyers solely for a conviction; they punish for the conduct underlying the conviction." *Ibid.* It thus concluded that coram nobis relief would not be appropriate even if Pappas had applied for reinstatement because, "[a]lthough perhaps not illegal under *McNally*, Pappas's role in the scandal certainly proves grounds for his disbarment." *Ibid.*

The court likewise found that neither Craig nor North had shown any lingering civil disabilities threatening present harm as a result of their convictions. It rejected their claim that coram nobis relief was justified to allow them to receive pension benefits taken from them upon their convictions. After noting that Craig and North had been entitled to a refund of any contributions paid into the plan, the court stressed that "[a]ny harm to Craig and North for their removal from the pension plan occurred entirely in the past" and "is a sunk cost, much like a criminal fine." Pet. App. 13.[2]

Finally, the court rejected the claim of Pappas, Craig, and North that the "cornucopia of disabilities that the Illinois statutes have in store for convicted felons" justified coram nobis relief. Pet. App. 13. The court explained: "For most of these disabilities, it is enough to observe that they are speculative possibilities at best; there has been no showing that any of these disabilities will cause any of the petitioners

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[2] In *United States* v. *Keane*, 852 F.2d 199, 204 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989), the court had stated that a criminal fine "is a sunk cost rather than a continuing disability producing additional injury as time passes." The court explained that if a civil fine had been entered against a defendant there would be no basis for reopening the judgment after it became final, and held that "the prospect of getting money back is not enough by itself to support belated review" pursuant to the extraordinary writ of error coram nobis, which exists to remedy fundamental miscarriages of justice. *Ibid.* Although petitioners North and Pappas never completed payment of their criminal fines, the court below apparently assumed that it made no difference whether the fine had been paid or not, since neither the reviewability of a civil judgment nor the fundamental character of the alleged error would depend on whether payment had been made.

to suffer a present harm." *Id.* at 13-14. The court accordingly affirmed the denial of coram nobis relief to Pappas and Craig, and it reversed the granting of such relief to North.

ARGUMENT

1. Petitioners contend (Pet. 8-15) that this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits concerning whether a person who suffers no current civil disability as a result of an invalid mail fraud conviction is entitled to coram nobis relief.

a. In our brief acquiescing in the certiorari petition in *Keane* v. *United States*, No. 88-1178, and in our petition for a writ of certiorari in *United States* v. *Mandel*, No. 88-1759, we urged the Court to resolve the conflict on this issue. The Court, however, denied certiorari in both cases. *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989). Nothing has occurred since this Court denied certiorari in those cases that would make review in this case more appropriate.

b. In any event, apart from the court of appeals' conclusion that petitioners suffer from no current civil disabilities as a result of their convictions, petitioners are not entitled to coram nobis relief for at least two other reasons. First, both Pappas and Craig were convicted on two Travel Act counts for inducing another person to travel from Indiana to Illinois to further the scheme to bribe members of the General Assembly in violation of state law. As the district court noted in denying relief to Pappas and Craig, those "Travel Act convictions are as valid today as

they were prior to *McNally*." Pet. App. 28. Since those valid convictions would support any lingering civil disabilities from which Pappas and Craig claim to suffer, they are not entitled to coram nobis relief.

In addition, petitioners are not entitled to coram nobis relief because their conspiracy and mail fraud convictions do not amount to a miscarriage of justice. To be sure, since the indictment and the jury instructions were predicated on the intangible rights theory invalidated by *McNally*, petitioners would have been entitled to reversal of their convictions on direct appeal. As the Court explained in *United States* v. *Morgan*, 346 U.S. 502 (1954), however, the scope of coram nobis relief is considerably more limited. In *Morgan*, the Court stated that not all errors, but only those "of the most fundamental character," warrant coram nobis relief. *Id.* at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)).[3] The Court also emphasized that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. 511. See also *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (ruling that an intervening change in substantive law should be applied on collateral attack only if, under the change in the law, a conviction amounts to a "miscarriage of justice").

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[3] In the related context of habeas corpus review, the Court has described the sort of "fundamental miscarriage of justice" warranting collateral review in spite of a procedural default as an error that "probably has caused the conviction of one innocent of the crime." *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991), slip op. 25.

In this case, the defect in the indictment and the jury instructions did not amount to fundamental error since petitioners' scheme clearly would have resulted in a loss of property to the State of Illinois within the meaning of *McNally*. The scheme to bribe state legislators in return for their support of legislation to increase the weight limit on trucks carrying cement necessarily contemplated damage to the state highways, for more weight on the roads would obviously cause more damage over time. The State of Illinois would therefore have been deprived of its tangible property interest in protecting state roads, and the citizens of the State would have been deprived of tax dollars to pay for the increased road damage. Accordingly, since the bribery scheme clearly contemplated an ultimate loss to Illinois and its citizens of property within the meaning of *McNally*, petitioners' conspiracy and mail fraud convictions do not rest on any fundamental error entitling them to coram nobis relief.

2. Petitioner Estate of Jack E. Walker contends (Pet. 15-17) that the court of appeals improperly dismissed its application for coram nobis relief on the ground that it lacked standing. That claim does not warrant review, particularly in the circumstances of this case where the application would lack merit in any event for the reasons we have just stated.

Based on its earlier decision in *United States* v. *Kerner*, *supra*, the court of appeals correctly concluded that petitioner lacked standing to seek coram nobis relief on behalf of the decedent. Pet. App. 7-8. The court explained in *Kerner* that "the narrow 'zone of interests' protected by the writ [of error coram nobis] includes only the [defendant's] right to be free from any lingering civil disabilities remaining from his arguably wrongful conviction." 895

F.2d at 1163. The court also noted that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' ". *Ibid.* (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). Consequently, as the court in *Kerner* went on to conclude, "an estate lacks standing to bring a petition for writ of error coram nobis because it is outside the 'zone of interests' protected by the writ." 895 F.2d at 1163.

In any event, it is settled law that a criminal case abates upon the death of the defendant. See *Durham* v. *United States*, 401 U.S. 481, 483 (1971); *Menken* v. *Atlanta*, 131 U.S. 405, 405 (1889); *United States* v. *Dudley*, 739 F.2d 175, 176 (4th Cir. 1984). The same principle applies in the case of collateral attacks on criminal convictions. See, *e.g.*, *McMann* v. *Ross*, 396 U.S. 118 (1969) (per curiam); *Mintzes* v. *Buchanon*, 471 U.S. 154 (1985); *Warden* v. *Palermo*, 431 U.S. 911 (1977); see also *United States* v. *Oberlin*, 718 F.2d 894 (9th Cir. 1983). Since a petition for a writ of error coram nobis is but "a step in the criminal process" and "is of the same general character as [a motion for collateral relief] under 28 U.S.C. § 2255," *United States* v. *Morgan*, 346 U.S. at 505-506 n.4, it follows that any request for coram nobis relief after Walker's death was moot. For that reason, the dismissal of the Estate's application for coram nobis relief on the decedent's behalf was proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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